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No. 111

IN THE

Supreme Court of the United States

October Term, 1960

BURTON N. PUGACH,

Petitioner,

—vs.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE*

THE DISTRICT ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

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HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

BRIEF *AMICUS CURIAE*

THE DISTRICT ATTORNEYS' ASSOCIATION OF THE STATE OF NEW YORK

Interest of the *Amicus Curiae*

The serious dilemma of New York's law enforcement officers, posed by the *Benanti* decision, is whether to use the vital tool of telephone interception by law enforcement officers against crime, as the source of evidence in a state criminal prosecution—and run the risk that such official action would be in violation of Federal law, punishable as a misdemeanor (see concurring opinion of Judge Waterman, *Pugach* v. *Dollinger*, 277 F. 2d 739, 746)—or endanger the over-all security of the People of the State of New York

under the mandates of this Court's decision in *Benanti* v. *United States*.*

It is our earnest conviction that the holding in *Benanti*, so unprecedently disastrous to the administration of criminal justice in this state, and upon which the petitioner at bar wholly depends, should be re-examined, particularly in view of the Court's prior holding in *Stemmer* v. *People of the State of New York* (336 U. S. 963, Petition for re-hearing denied, 337 U. S. 921).

Summary of Argument

Benanti v. *United States* (335 U. S. 96), upon which petitioner relies, is in irreconcilable conflict with the Court's controlling precedent in *Stemmer* v. *People of the State of New York* (336 U. S. 963), re-hearing denied 337 U. S. 921) which was completely overlooked, both by this Court, and in the Court below.

New York State's statute (Article 1, Section 12, New York State Const. Sec. 813-a, New York Code of Crim. Pro.) for telephone interception by law enforcement officers, under safeguards consistent with a reasonable search and seizure, does not contradict the policy of Section 605 of the Federal Communications Act.

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* See Appendix, pp. 2a-67a, testimony of *District Attorney Edward S. Silver, Kings County*, before the Sub-Committee on Constitutional Rights, Committee on the Judiciary, U. S. Senate (S. Res. 62, 86th Congr., 1st Session, July 9, 1959).

Testimony of *District Attorney Frank S. Hogan, New York County* (pp. 68a-108a), and *Police Commissioner Stephen P. Kennedy, City of New York* (pp. 109a-127a), Public Hearings, New York State Commission of Investigation, *"The Current Wire-Tapping Dilemma in New York State Created by Recent Federal Court Decisions"*, April 5, 1960.

Section 605 of the Federal Communications Act must be construed within the orbit of the Interstate Commerce clause, and not strictly as an anti-wiretapping statute, in order to save its constitutionality under Article 1, Section 8 of the United States Constitution.

Considering the legislative environment of Section 605, a construction that Section 605 was intended to apply to telephone interceptions under New York State law would be clearly unconstitutional and violative of the state's reserved police powers under the Tenth Amendment of the Constitution of the United States.

ARGUMENT

POINT FIRST

Benanti v. _United States_, 355 U. S. 96, upon which petitioner relies, is in irreconcilable conflict with the Court's controlling precedent in _Stemmer_ v. _People of the State of New York_, 336 U. S. 963, re-hearing denied, 337 U. S. 921.

A. The *Benanti* case was incorrectly decided.

With the utmost reverence and respect for the Court, we are constrained to submit that *Benanti* v. *United States*, 355 U. S. 96, upon which the Petitioner wholly relies, is in irreconcilable conflict with the Court's prior decision in *Stemmer* v. *People of the State of New York*, 336 U. S. 963, petition for rehearing denied 337 U. S. 921.

We further respectfully submit to the Court that, due to an inadvertent but serious error of omission in the Court below, (*Benanti* v. *United States*, 244 F. 2d 389), as well

as in this Court, the significant *Stemmer* decision was completely overlooked.

The decision of the United States Court of Appeals in *Benanti* was fatally defective in its inadvertent omission of reference to this Court's affirmance in *Stemmer* v. *People of the State of New York* (336 U. S. 963); petition for re-hearing denied, 337 U. S. 921, of the New York Court of Appeals decision in *People* v. *Stemmer* (298 N. Y. 728), to which it had referred in its opinion.

Further accenting this oversight, the United States Court of Appeals—evaluating the legality of New York's wire-tap procedure under court order—explicitly declared in its opinion—again inadvertently, but yet profoundly grave in its impact on the ultimate result—that "*the New York cases do not deal with this point; they concern only the admissibility in evidence in the New York courts of wire-tapping evidence.*"

As a footnote thereto, the Court appended the following citations:

> "*People* v. *Saperstein*, 2 N. Y. 2d 210—N. E. 2d—cert. den.—U. S. (April 29, 1957); People v. Feld, 305 N. Y. 312, 113 N. E. 2d 440; People v. Tieri, 300 N. Y. 569, 89 N. E. 2d 526; *People v. Stemmer*, 298 N. Y. 728; *Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15, 68 N. E. 2d 654 * * *." (Italics ours)

The fact of the matter is, as we shall presently show, that both the *Harlem Check Cashing* case and the *Stemmer* case were decisions of the New York Court of Appeals precisely predicated on the validity of New York's wire-tap procedure in the context of Section 605.

In the Matter of *Harlem Check Cashing Corp.* v. *Bell*, *supra*, the *per curiam* decision of the court held:

"We are not persuaded that we are constrained by the decision in *Weiss* v. *United States* (308 U. S. 321 to condemn *as illegal* the disclosure and divulgence, by use in evidence, of the intercepted messages which were recorded by tapping wires in accordance with the statutes of the State as expressly authorized by the Constitution of the State (N. Y. Const., art. I, Sec. 12; Code Crim. Pro., Sec. 813-a). That case dealt with intercepted telephone messages procured without a court order and in violation of the laws of this State (Penal Law, Sec. 1423, subd. 6) by a police officer acting under instructions of a post-office inspector, and the sole question decided was 'whether the (Federal) trial court properly received in evidence intercepted telephone communications' (*Weiss* v. *United States*, 307 U. S. 621, 308 U. S. 321, 326). While there are expressions in the opinion of the court which seem to go so far as to interpret the Federal statute as a substantive law forbidding all disclosure or divulgence, the decision was concerned only with the propriety of the receipt of such intercepted messages in evidence on the trial of a criminal case in a Federal court. *The State of New York having provided, by Constitution and statute, certain specific methods by which it may exercise its fundamental power of gathering evidence of criminality and of prosecuting crime, it surely is not to be assumed that Congress intended to circumscribe that power unless it unequivocally indicated such an intent. A Federal statute, it is recognized, must be presumed to be limited in effect to the Federal jurisdiction and not to supersede a State's exercise of its police power unless there be a clear manifestation to the contrary.* (*Townsend* v.

> *Yeomans*, 301 U. S. 441, 454; *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, 392-393; *Savage* v. *Jones*, 225 U. S. 501, 533.)" (Italics supplied)

Likewise, in *People* v. *Superstein*, 3 N. Y. 2d 210, 214; 140 N. E. 2d 252, cert. den. 353 U. S. 946, the New York Court of Appeals again adverted to its previous decision in *Matter of Harlem Check Cashing Corp.* v. *Bell, supra*, and pointedly held:

> "The *Harlem* case holding was that *New York State's method of permitting the tapping of wires* and the admission into evidence of the recordings thereof is not a violation of Section 605 of the Federal Communications Act (U. S. Code, tit. 47, Sec. 605 * * *)". (Italics ours)

Thus, it conclusively appears that this Court, in *Benanti*, had been accidentally deprived, not only of a full and fair consideration of its own vital prior holding in *Stemmer* v. *People of the State of New York, supra*, but also of the judicial construction placed upon the issue by the New York Court of Appeals.

In fact, not one of these New York cases was mentioned in the briefs submitted to the Court by either party, whether the Petitioner *Benanti* or the Government—a *fait accompli* explainable only because the holdings of these very cases had been overlooked in the Court below as aforestated.

B. The *Stemmer* case is a controlling judicial precedent.

Directly drawn into contention in the *Stemmer* case, as in *Benanti* v. *United States, supra*, was the validity of the legalized wiretap under organic New York law (Article 1, Section 12, New York State Constitution; Section 813-a,

New York Code of Criminal Procedure), in relation to Section 605 of the Federal Communications Act.

The *Stemmer* case was unanimously affirmed by the New York Court of Appeals, as the decision itself notes, on the authority of its own prior decision in *Matter of Harlem Check Cashing Corp. v. Bell* (296 N. Y. 15, 1946, 68 N. E. 2d 854). There, in a *per curiam* decision, the State's highest Court held as follows:

> "Upon this appeal the following question was presented and necessarily passed upon: The appellants contended that the receipt in evidence of wire tapped telephone calls was illegal because of section 605 of the Federal Communications Act of 1934 (U.S. Code, tit. 47, Sec. 605). This Court held to the contrary. (See *Matter of Harlem Check Cashing Corp. v. Bell*, 296 N. Y. 15.) No opinion."
>
> *People* v. *Stemmer*, 298 N. Y. 728 (1948), 83 N. E. 2d 141.

The *Stemmer* case was subsequently affirmed in a *per curiam* decision by an equally divided court* in *Stemmer* v. *People of the State of New York* (336 U. S. 963, May 2, 1949) Mr. Justice Jackson not participating.

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* "*Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below*" (*Durant* v. *Storrow*, 101 U. S. 555).

Whether the *Stemmer* decision, by an equally divided Court, petition for re-hearing denied by a full Court (Mr. Justice Jackson not participating) should or should not be deemed within the principle of *stare decisis* as a controlling judicial precedent, is not material. The point of emphasis is that it was entirely overlooked, and never considered for any purpose in the later *Irvanti* decision of the Court (See *Hertz* v. *Woodman*, 218 U. S. 205).

Petition for re-hearing was denied by a full Court, again Mr. Justice Jackson not participating (337 U. S. 921) May 31, 1949.

In the briefs filed in this Court, both the petitioner *Stemmer* and the respondent, *The People of the State of New York*, squarely put into issue the validity of legalized telephone interception under New York law.

The People's main thrust—both on certiorari and on the main appeal—was tersely and succinctly set forth in a single paragraph, constituting the entire brief of the Respondent. Because of its singular brevity and its crucial significance to the point here raised, it is here reproduced *in toto*:

> "Petitioners claim that the court improperly received the evidence (Stemmer pp. 4-9, Krakower pp. 5-6, 9-14). This is without basis. *The interceptions were properly made under State law, and the federal act is without application* (see Federal Law supra pp. 9-10; cf. affidavits and orders Dec. 2, 10, appendix 5-20; New York Penal Law Sec. 1423, subd. 6, appendix 21; New York Constitution, Art. I, Sec. 12, appendix 24; New York Code Crim. Proc. Sec. 813-a appendix 25; State Proceedings, supra pp. 5-8; also *Leon v. State* (1942), 180 Md. 279, 284, 23 Atl. (2d) 706, 709, *cert. den. sub nom. Neal* v. *Maryland*, 316 U. S. 680; Law and cases, appendix 47)." (Italics supplied)

Again, in the petition for a re-hearing submitted to this Court, the petitioner *Stemmer* starkly adverted to the fact that on the argument of the main appeal to this Court, "*counsel for the State of New York rested his argument that state officers were not included in the ban on the Fed-*

eral Communications Act * * *" (Pet. Br. p. 3); and again reiterated by strenuous counter-argument in the brief, the People's principal contention that state law enforcement agents were exempt from the anti-interception provisions of the Federal law (Pet. Br. p. 4).

In summary, we are impelled to the conclusion that the Court's decisions in *Benanti* and *Stemmer*, respectively, are in fundamental estrangement with each other on the single central question common to both—necessarily and actually drawn into question in each case—viz. the validity of New York's laws in relation to Section 605.

In *Stemmer*, which affirmed the New York Court of Appeals' judgment in reliance on *Harlem Check Cashing Corp. v. Bell*, the legalized interception by state law enforcement officers under New York law was implicitly, if not explicitly, held lawful and not in violation of Section 605 of the Federal Communications Act; in *Benanti*, however, the Court reached a diametrically opposite result in holding that New York State law enforcement agents were in violation of Federal law.

Further, we are fairly fortified in our evaluation of *Stemmer* by recent decisions of the New York Court of Appeals, subsequent to the *Benanti* decision on December 9, 1957, which were pointedly left undisturbed by this learned Court in its consistent denial of petitions for certiorari in each case.

(*People* v. *Graziano*, (1958), 4 N. Y. 2d 881, 150 N. E. 2d 768, cert. den. 358 U. S. 851. *People* v. *Broady* (1959), 5 N. Y. 2d 500, 6 N. Y. 2d 814, 158 N. E. 2d 817, 159 N. E. 2d 690, cert. den. and appeal dismissed *per curiam*, 361 U. S. 8.)

(*People* v. *Dinan*, 1959, 6 N. Y. 2d 715, 158 N. E. 2d 501, cert. den. 361 U. S. 839.)

C. *Schwartz* v. *Texas* is wholly inapplicable to the case at bar.

We regrettably note too, that even *Schwartz* v. *Texas*, 344 U. S. 199 (1952), contains the same grave error of omission regarding the *Stemmer* case. At page 202 of the Court's opinion appears the following statement:

> "This question has been many times before the state courts, and they have uniformly held that Sec. 605 does not apply to exclude such communications from evidence in state courts. Leon v. State, 180 Md. 279, 23 A 2d 706; *People* v. *Stemmer, 298 N. Y. 728, 83 N. E. 2d 141*; Harlem Check Cashing Corp. v. Bell, 296 N. Y. 15, 68 N. E. 2d 854; People v. Channell, 107 Cal. App. 2d 192, 236 P 2d 654. *While these cases are not controlling here*, they are entitled to consideration because of the high standing of the courts from which they come." (Italics supplied)

We say it earnestly, in retrospect, that it is altogether apparent that had the *Stemmer* case been duly accredited with its baptismal of affirmance and crown of denial of petition for re-hearing in this tribunal of ultimate decision, *Schwartz* v. *Texas, supra*, might well have fortuitously served as a suitable proving ground of decision in the evolving construction of Section 605, clearly delineating the "dirty business" of Texan wiretapping there postulated as one wholly distinguishable from the legalized procedure of New York law, studded with restraints closely akin to the constitutional safeguards of a reasonable search and seizure.

The Petitioner would ambitiously have this Court overrule *Schwartz v. Texas, supra* (Pet. Br. p. 18), on the ground that "*Schwartz* has encouraged state officials, district attorneys and judges to become parties to a criminal act in the very Court room that is supposed to represent law and order".

Our answer, in brief, is that *Schwartz v. Texas*—propounded in a backdrop of illegal wire-tapping grossly offensive to the policy against unreasonable search and seizure (*Goldstein* v. *United States*, 316 U. S. 114)—simply does not apply to the case at bar.

In view of the singular and enormously significant oversight, both in *Benanti* v. *United States, supra,* and in *Schwartz v. Texas, supra,* which have defaulted the Court's landmark guide of decision in *Stemmer v. People of the State of New York,* and in view of the extraordinary consequences which have befallen the courts and law enforcement officers of the State of New York, so graphically demonstrated in the case at bar, we respectfully urge upon the Court a conceptual re-consideration of *Benanti* v. *United States.*

We urge the Court that the re-consideration of *Benanti* is particularly called for, in the light of the further special fact that *Benanti* was decided in a setting of a Federal prosecution, measured against the fact that *Stemmer* had been addressed specifically to a New York criminal proceeding, as in the case at bar.

POINT SECOND

The *Benanti* decision upon which petitioner wholly relies, should be re-considered.

A.

The common capillary coursing through the veins of the *Benanti* decision by this Court were the *Nardone* decisions "which laid down the underlying premises upon which is based all subsequent consideration of Section 605" (*Benanti* v. *United States, supra*, at page 100).

Threading through the *Nardone* cases, in turn, was the "dirty business" of illegal, unauthorized and unbridled wire-tapping by Federal agents, permeating *Olmstead* v. *United States* (277 U. S. 438)—which, only by the narrowest of margins, was reprieved from the outright condemnation of the Fourth and Fifth Amendments.

In both *Nardone* cases, the factual pattern presented was that of substantially unregulated wire-tapping by Federal agents, with no prior effective restraints of judicial direction or control.

In *Nardone* v. *United States*, 302 U. S. 379, at page 383, the Court declared its underlying rationale:

> "The answer to the question is one of *policy*. Congress may have thought it less important that some offenders should go unwhipped of justice than that the officers should resort to methods *inconsistent with ethical standards and destructive of personal liberty.*" (Italics ours)

This view was reiterated in the later *Nardone* case, (308 U. S. 338), again holding that its previous construction of

Section 605 "*was the translation into practicality of broad considerations of morality and public well-being.*"

Looming in the background was *Olmstead* v. *United States, supra.* There, in Mr. Justice Holmes' classic dissent, the illegal wire-tapping of Federal Prohibition agents in palpable violation of the laws of the State of Washington, was held "an odious crime against state law", in which the Government's "criminal act" played an "ignoble part".

Olmstead has been the bedrock corner-stone in the evolving monolith of the cases following *Nardone: Weiss* v. *United States,* (308 U. S. 321); *Goldstein* v. *United States* (316 U. S. 114), and *Schwartz* v. *Texas* (344 U. S. 199).

In *Weiss* v. *United States, supra,* the wire-tapping by police officers acting under instructions of a United States Post Office inspector, was in violation of the explicit law of New York (Consolidated Laws of New York, Chapter 40, Section 1423, Subdivision 6)—ante-dating its present wire-tapping statute (Article 1, Section 12, New York State Constitution, Section 813-a, Code of Criminal Procedure)—and was done, as this Court declared, "*in the teeth of Section 1423, Subdivision 6 of the Penal Law of the State of New York, making wire-tapping a crime*".

There is a fundamental difference, however, between the "dirty business" postulated by these decisions, as against the Constitutionally mandated, statute-implemented, and judicially-controlled wire-tapping under New York law (Appendix 30a-31a).

Here, as in *Stemmer* v. *People of the State of New York, supra,* heretofore affirmed by this court, the Petitioner was no victim of illegal or unethical practices of state law en-

forcement officers, such as was properly condemned in *Olmstead, Nardone, Goldstein, Weiss,* and *Schwartz v. Texas.*

Rather, the gathering of evidence was under a circumspect statute containing every built-in pre-condition for a reasonable search and seizure.

Paraphrasing the very language of Mr. Justice Brandeis in *Olmstead v. United States, supra,* at pages 471-2: "* * * If wire-tapping can be deemed a search and seizure within the Fourth Amendment", such wire-tapping as was practiced in the case at bar was a *reasonable* search and seizure, and the evidence thus obtained was admissible.

B.

The law in New York is even more comprehensive in scope than is Section 605 of the Federal Communications Act. It has outlawed wire-tapping absolutely, even by imbedding the ban as an integral part of the search and seizure provisions of the New York Constitution (Art. 1, Sec. 12).

The penalty provisions, applicable to law enforcement officers and others alike, are certainly more severe than Federal law provides—declaring a violation a felony punishable by a maximum two-year term, as against the counterpart one-year maximum for the Federal misdemeanor (*Sec. 813-b, New York Code of Criminal Procedure; cf. Section 501 Federal Communications Act*).

Heavily implementing this statute is a penal provision barring the possession of wire-tapping instruments. Section 742 of the New York Penal Law provides that one guilty of the possession of instruments "under circum-

stances evincing an intent to unlawful use or employ or allow the same to be so used or employed for eavesdropping or knowing the same is intended to be so used, shall be guilty of a misdemeanor and if he has been previously convicted of any crime, he shall be guilty of a felony."

New York statute authorizes interception by law enforcement officers only upon order duly issued by a Justice of the Supreme Court or Judge of a County Court, or of the Court of General Sessions of the County of New York.

The order must be supported upon oath or affirmation of a District Attorney, or of the Attorney General, or of a police officer above the rank of Sergeant "*that there is reasonable ground to believe that evidence of crime may be thus obtained.*" The affidavit must particularly describe the person or persons whose communications, conversations, or discussions are to be overheard or recorded and the purposes thereof, with full identification of the particular telephone number embraced by the order.

In connection with its issuance, the Judge "may examine on oath an applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable ground for the granting of such application. The order shall be effective for the time specified therein, but not for a period of more than two months, unless extended or renewed by the Judge upon satisfying himself that such extension or renewal is in the public interest."

POINT THIRD

New York State's statute for telephone interception by law enforcement officers, under safeguards consistent with a reasonable search and seizure, does not contradict the letter or policy of Section 605 of the Federal Communications Act.

A. The New York statute is implementive of Section 605 and the Interstate Commerce clause.

New York's constitutional and statutory scheme for telephone interception by state law enforcement officers, under appropriate court order, issued only when "there is reasonable ground to believe that evidence of crime may be thus obtained" (*Art. I, Sec. 12, New York State Constitution; Sec. 813-a, New York Code of Criminal Procedure*) is clearly neither in contradiction of the interstate commerce clause of the Constitution, nor of the "policy considerations motivating Section 605" (*Benanti* v. *United States, supra*).

I.

Section 605 of the Federal Communications Act was clearly intended to further the lawful purposes of communication, rather than those for a corrupt, unlawful, or criminal end.

To hold otherwise, would amount to a stultification and patent self-emasculation of the Congressional intent (see *United States* v. *Gris*, 247 F. 2d 869), and to a fatal subversion of the interstate commerce clause from which Section 605 was derived.

The power to regulate commerce is the power to outlaw or restrain an obstruction to commerce (*Second Employers Liability Cases*, 223 U. S. 1, 47, 53-4); to provide for its "protection and advancement" ("*The Daniel Ball*", 10 Wall. 557, 564 (1871); "to promote its growth and insure its safety" (*Mobile County* v. *Kimball*, 102 U. S. 691, 696-7 (1881)); to guard against obstructions by state legislation of the instruments of commerce (*Federal Radio Comm.* v. *Nelson Bros., B & M Co.*, 289 U. S. 266, 279).

In *Goldman* v. *United States* (316 U. S. 129), involving a direct construction of Section 605, the Court declared, at page 133:

> "The protection intended and afforded by the statute is *the means of communication* and not of the secrecy of the conversation." (Italics supplied)

In *Brooks* v. *United States*, (267 U. S. 432, 436), construing the National Motor Vehicle Theft Act in the context of the interstate commerce clause, the Court flatly held:

> "*Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce*".

Further, the Court characterized the act of interstate transportation of a stolen motor vehicle as a "*gross abuse of interstate commerce*".

As a corollary proposition, it is clear that New York's statute designed to obtain evidence of crime, is likewise proper as a potent sifting device for the legitimate purposes of interstate commerce.

The sender of a communication which would unlock the door to a murder or robbery, or spill a confession of guilt to a heinous crime, either consummated or in the planning stage, or lead a state law enforcement officer to a denouement of an espionage against the security of the state, or bag an illegal wire-tapper to preserve the integrity of communications under Section 605, or solve a serious maiming as in the case of *Pugach*—these are not the kind of communications which the Congress ever intended to protect against interception under the sheltering force of the commerce clause.

> *"There is a manifest difference between the case of a private individual who intercepts a message from motives of curiosity or to further personal ends, and that of a responsible official engaged in the governmental duty of uncovering crime and bringing criminals to justice."*

Dissent of Mr. Justices Sutherland and McReynolds in *Nardone* v. *United States*, 302 U. S. 379, 386.

B. Unless so construed, Section 605 would be unconstitutional and void as an unreasonable exercise of the power of Congress to regulate interstate commerce.

If Sec. 605 is to be construed strictly as a wire-tapping statute, within the "police power" of the Federal Government—rather than as an incidental exercise of the power of Congress to regulate interstate commerce—then patently, the statute must fail for unconstitutionality because the

police power is reserved exclusively to the States, and not to the Federal Government.

Hamilton v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146.

Section 605 must stand or fall solely on the question of its proper application to interstate commerce, namely, whether or not a total ban on interception of telephone communcations, binding on every person—law enforcement officers or not alike, even as to New York's position at Lar—would be offensive to the reasonable use of the commerce clause of the Constitution (*Art. 1, Sec. 8, U. S. Const*).

C. An interception within the framework of a reasonable search and seizure does not militate against the policy considerations motivating Section 605.

A construction of Section 605 that would bar New York's state law officers from intercepting telephone communications to obtain evidence of crime would be an intolerable application of the Congressional power over interstate commerce. Such an exercise in frustration of the "policy considerations motivating Section 605" is unthinkable as expressive of the legislative intent.

Practical considerations alone would militate against any such interpretation. For one thing, it would inexorably lead to a dangerous spread of the already widespread vicious practice of illegal wire-tapping with little risk of detection—in gross defiance of New York law, no less than that of Federal law—at least to the full extent that lawful wire-tapping by state law officers is interdicted by Section 605.

The Petitioner himself put the issue in sharp focus:

> "In the light of the so-called legal taps, the figures of the private professional tappers must be staggering and the right of privacy of telephonic communication despite Section 605 is, for all purposes, a figment of the imagination". (Pet. Br. p. 11).*

It is fantastic to believe that Section 605 was ever intended to require so topsy-turvy a construction—as the petitioner now urges upon this Court—that a legalized interception duly granted to a New York state law officer pursuant to a state statute, the State Constitution, and a Court

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* *Parenthetically, the figures given by Petitioner as to court-ordered wiretaps in New York City require clarification* (Pet. Br. p. 10, footnote 3).

In 1952, a representative year, all five district attorneys in New York City and the entire police—covering a population of 8½ million people—procured a total of 480 court orders (App. pp. 32a, 113a). *This figure is less than half the total indicated by the Petitioner for New York City.*

Petitioner's reference to the total number of orders "received by the telephone company in New York City" (1013 in the year 1953 and 1135 in the year 1954) apparently could refer only to the number of court orders received by the New York City Telephone Company as the central repository and authorizing agency for the telephone system affecting court orders issued throughout the entire state.

Statewide, for the five-year period 1950-1954, the total number of court orders procured by 61 of the 62 district attorneys in this State averaged 479 a year, covering a population of almost 15 million people (App. p. 32a).

Over the eight year period, between 1952 and 1959, the New York City Police Department obtained an average of 290 court orders per year (App. pp. 81a, 113a-114a).

Our conclusion is precisely borne out by Prof. Westin's article in Commentary, April, 1960: "In 1954 1,135 court orders were obtained by all the law enforcement agencies in the State of New York, with a population of almost 15 million." (Reported in Hearings before Subcommittee on Constitutional Rights, Committee on the Judiciary (S. Res. 62, 86th Cong. 1st Session), Part 5, "Wiretapping, Eavesdropping and the Bill of Rights", p. 1960.)

authorization, be not only invalidated as to all cogent evidence of crime thus obtained—even to the extent of a Federal injunction—but implicate the law officer himself in the commission of a Federal crime punishable under Section 501.

Such a patently excessive use of the power over interstate commerce—"*leading to absurd or wholly impracticable consequences*"—would itself render Section 605 invalid for unreasonableness (*Caminetti* v. *United States*, 242 U. S. 470, 490; Art. 1, Sec. 8, U. S. Const.).

Mr. Justices Sutherland and McReynolds, dissenting in *Nardone* v. *United States*, 302 U. S. 379, 385, 387, give poignant substance to our argument:

> "*The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court.* * *"
>
> "*My abhorrence of the odious practices of the town gossip, the peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion.* * * *In the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried in the present case*

to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality.''

Section 605 ''*must be interpreted in the light of reason and common understanding to reach the results intended by the Legislature*'' (*Rathbon* v. *United States*, 355 U. S. 107, 109).

Viewed thusly, it becomes obvious that Section 605 and Article I, Sec. 12 of the New York State Constitution are complementary statutes. ''*The public good is the end and aim of both*'' (see *Gilman* v. *City of Philadelphia*, 70 U. S. 713, 730).

D. Authorization of the sender is not required under a New York court-ordered interception.

As is plain from the wording of the statute, Section 605 does not outlaw interception of telephone communications absolutely. The ban is limited as to interceptions only ''*not being authorized by the sender*''.

It is thus clear that the thrust of the statute is to protect the means of communication, rather than the privacy of the sender—enforceable or not, at his own instance. This is a right which could be waived by outright consent or authorization, as explicitly set forth in Section 605, or by operation of law as in the case of a sender whose message is intercepted by a reasonable search and seizure, to obtain evidence of crime.

In close analogy, even the absolute right of privacy of the mails must yield to the right of official interception based on a reasonable search and seizure to obtain evidence of crime (*Matter of Jackson*, 96 U. S. 727, 733). ''*There is*,

in essence, no difference between the sealed letter and the private telephone message", stated Mr. Justice Brandeis in *Olmstead* v. *United States, supra,* at page 474.

The fixed policy of the Court, in construing cases relative to the admissibility of evidence under Section 605 is to apply the principles of a reasonable search and seizure, short of the Fourth Amendment itself.

"*Although the unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Fourth Amendment*" (*Goldman* v. *United States*, 316 U. S. 129; *Olmstead* v. *United States*, 277 U. S. 438), said this Court in *Goldstein* v. *United States*, 316 U. S. 114, 120, "*we have applied the same policy in respect of the prohibitions of the Federal Communications Act* * * *".

It must logically follow that the same policy should guide the Court in a construction of the *method* of interception by which the evidence is obtained.

A court-sanctioned interception, under warrant of organic New York law, predicated on principles substantially identical to a reasonable search and seizure, was no more intended to be reached by Section 605—in aid of the free flow of interstate commerce—than would, say, an alleged privileged communication between malefacting parties be suffered to shield the plottings of a criminal conspiracy inimical to the legitimate purposes of commerce.

The same principles of waiver by operation of law has been applied to the right of privacy in other situations. For example, to the sanctuary of alleged attorney-client relationships, where "*if the communication be made in furtherance of any criminal or fraudulent purpose, it is not*

privileged" (*Alexander* v. *United States*, 138 U. S. 353, 359). See also *Clark* v. *United States*, 289 U. S. 1, 15-16; *Reg.* v. *Cox*, L. R. 14 Q. B. Div. (Eng.) 153; *Wharton's Crim. Evid.*, 11th Ed., Sec. 1233; *People* v. *Farmer*, 194 N. Y. 251, 269, 87 N. E. 457; *People* v. *Vogelstein*, 150 Misc. N. Y. 714, aff. 242 App. Div. (N. Y.) 611; 125 A. L. R. 511.

Again, Mr. Justice Cardozo, speaking for a unanimous Court in *Clark* v. *United States* (289 U. S. 1, at p. 14), held, as to the privilege against disclosure of a jury's deliberations:

> *" • • • we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued • • • The privilege takes as its postulate the genuine relation, honestly created and honestly maintained. If that condition is not specified, if the relation is merely a sham and pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of truth".*

By parallel reasoning, *Rathbon* v. *United States, supra*, decided simultaneously with *Benanti*, held that the interception of a telephone conversation between a would-be murderer and his intended victim by means of a telephone extension, was admissible even though it was expressly shown that there was no authorization of the sender.

Similarly, the absence of authorization or consent was not fatal to the surreptitious transmission of a private conversation by use of a detectophone placed on the outer wall of the defendant's hotel room (*Goldman* v. *United States*, 316 U. S. 129) or to an overheard conversation of a narcotic peddler by means of a radio transmitter secreted on a Gov-

ernment under-cover agent (*On Lee* v. *United States*, 343 U. S. 747). Said this Court in the *On Lee* case, at page 754:

> "The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, *even if they focus without his knowledge or consent upon what one supposes to be private indiscretions.* It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties, improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here." (Italics supplied)

It might be urged in contention that the "sender" might himself be an altogether innocent participant in the communication intercepted. The answer is that the sender's own innocence would no more require an authorization to an interception, if lawfully authorized by court order to obtain evidence of crime than would, say, the consent of a party to a reasonable search and seizure depend upon the custodian's own innocence or involvement with crime (See *Wilson* v. *United States*, 221 U. S. 361).

Nor would the right to invoke the privilege between attorney and client "depend upon the showing of a conspiracy, upon proof that client and attorney are involved in equal guilt. *The attorney may be innocent, and still the guilty client must let the truth come out.*" (*Clark* v. *United States*, *supra*, p. 15).

POINT FOURTH

A construction that Section 605 applies to telephone interceptions under New York Law (Article I, Section 12, New York State Constitution: Section 813-a New York Code of Criminal Procedure) would be clearly unconstitutional and violative of the states' reserved police powers under the Tenth Amendment of the Constitution of the United States.

A. The police power under the Tenth Amendment.

> *"The police powers of a State form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government, all which may be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State . . . are component parts of this mass".*
>
> *Phillips* v. *Mobile*, 208 U. S. 472, 479.

The exercise by a State of its police power will not be interfered with unless it is exercised arbitrarily or unreasonably.

Hadachek v. *Sebastian*, 239 U. S. 394; *Jones* v. *Portland*, 245 U. S. 217; *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 *U. S.* 405.

The intention of Congress to exclude the states from exercising their police power must be clearly manifested to justify a holding that the state legislation conflicts with the Federal law (*International Union U. A. W. A. F. of L.* v. *Wisconsin Employment Labor Relations Board*, 336 U. S. 245, re-hearing denied 336 U. S. 970).

The Congressional intention to displace local laws in the exercise of its commerce power should not generally be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose; particularly when public safety and health are concerned. *Maytrer* v. *Hamilton*, 309 U. S. 598; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148; *Sherlock* v. *Alling*, 93 U. S. 99; *Reid* v. *Colorado*, 187 U. S. 137; *Clason* v. *State of Indiana*, 306 U. S. 439.

In *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 766, the Court held:

> "*Congress, in enacting legisaltion within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested* (cases cited), *or unless the state law; in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy* (cases cited)."

Similarly, in *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261:

> "*An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication* • • • *should be at least as persuasive when the question is one of the nullification of state power by congressional legislation.*

And, in *Schwartz* v. *Texas*, 344 U. S. 199:

> *"Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."*

Applying these salient principles of Constitutional construction at bar, we respectfully submit that the legislative environment of Section 605 requires a construction that the Congress never intended to interdict New York's law enforcement officers from intercepting telephone communications, under Court order, to obtain evidence of crime, and that any construction to the contrary would be in violation of the States' reserved police powers under the Tenth Amendment of the Constitution of the United States.

B. Legislative environment.

History of the Act.

It is an insupportable assumption that Section 605 was ever intended to apply to a New York State interception under Article I, Section 12 of the New York State Constitution. This is conclusively borne out, not only by the explicit language of the Act itself, but by its legislative history.

There is not a word in the Congressional debates attending the passage of the Federal Communications Act of 1934, or the Radio Act of 1927 from which it was derived, to

suggest or intimate that a state law enforcement officer was intended to be covered by Section 605 of the Act (see *Nardone* v. *United States*, 302 U. S. 379).

An objective examination of the debates and the proceedings in the Congress discloses no intention whatever on the part of the Congress to put law enforcement officers within the ambit of control of Section 605 of the Act (*Congr. Rec. Index to Proceedings and Debates, 73rd Congress, Second session, Vol. 78, Part 12, January 3, 1934-June 18, 1934; House of Representatives, Report No. 1850, 73rd Congress, Second Session, June 1, 1934, page 3; Senate Report No. 781, 73rd Congress, Second Session, April 17, 1934*).

On the contrary, an examination of the legislative design of the Radio Act of 1927 (Ch. 169, February 23, 1927), from which Section 605 of the Federal Communications Act is derived, discloses that the parent statute expressly authorized the monitoring by the Government of offensive and obscene radio transmissions.

In 1937, in *Nardone* v. *United States*, 302 U. S. 379, the Court had held that Congress, by its passage in 1934 of Section 605 of the Federal Communications Act, had forbidden entirely the use of such interceptions by federal officers. During the years which followed, a number of unsuccessful measures were proposed to change this rule as to federal officers, debate on which measures showed Congress' awareness of the different interception policy adopted by New York State (*83 Cong. Rec. (1938) 9453, 86 Cong. Rec. (1940) 9948-9949, 88 Cong. Rec. (1942) 4599;*

see S. 3756 (75th Cong. 3d Sess. 1938), H. J. Res. 571 (76th Cong. 3d Sess. 1940), H. J. Res. (77th Cong. 2d Sess. 1942).

In 1940 Congress undertook an investigation of all interceptions, including those used in State crime detection, to determine whether or not such practices called for remedial legislation (*86 Cong. Rec. (1940) 3116; see S. Res. 224 (76th Cong. 3d Sess. 1940); S. Rept. 1304 (76th Cong. 3d Sess. 1940) pp. 1, 7; 86 Cong. Rec. (1940) 889-890, 2693*).

A subcommittee held extended hearings, the New York practice was considered, and Congress took no action (*Senate Hearings pp. 240-241, 648-650, 659-661, 817-819, Senate Committee on Interstate Commerce, United States Wire Tapping Investigation (S. Res. 224, 76th Congr. U. S. Govt. Printing Office 1940-1941*).

Following the Court's decision in *Benanti*, in a statement on the floor of the United States Senate on behalf of the McClellan Bill (S. 3013), to amend Section 605 so as to authorize state law enforcement officers to intercept telephone communications under statutes permitting wiretapping by court order, Senator McClellan stated:

> "* * * *Congress has never intended to permit the criminal to use the means of modern communication with impunity by enjoining law-enforcement agencies from intercepting his communications. To accept such interpretation would mean that Congress intended to give criminals free license and encouragement to use communications without fear or handicap and * * * grant these criminals a 'privileged sanctuary'*". (*Appendix*, 35a-36a)

Addressing itself specifically to the *Benanti* decision of the Court, and to the need for corrective action, the *New York State Joint Legislative Committee on Privacy of Communications* (*Leg. Doc. No. 25 (1959), p. 19*).*

> "*We do not believe for an instant that the Congress intends to override and supersede the police power of New York* • • • ".

The language of Section 605.

It is particularly significant that the protection of privacy afforded by the Federal statute, under Section 605, is expressly subordinated "*in response to a subpoena issued by a Court of competent jurisdiction or on demand of other lawful authority*". Here, explicitly, is patent statutory recognition of the paramount right of enforced disclosure to the state as against the right of privacy to the individual. *Instanced here is that the authorization of the sender is wholly immaterial.*

Again, the word "person" is expressly defined in the Federal Communications Act as follows:

> "*A 'person' includes an individual, partnership, association, joint stock company, trust, or corporation.*"

In this special definition of the word "person" contained in the Act, the Congress made no modification whatever of the Rules of Construction set forth in the Code of Laws of the United States of America (*Title 1, United*

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* *Reported in Hearings before Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate (S. Res. 62, 86th Congr., 1st Session), Part 5, "Wiretapping, Eavesdropping and the Bill of Rights", p. 1847.*

States Code, Section 1), defining the word "person" as follows:

> "• • • • *The word 'person' may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office* • • • •"

The deliberate omission of a law enforcement officer, within the definition of the word "person" under the Federal Communications Act—especially in the context of the Congress' expressly declared intent to breach the privacy of radio and telephone communications on subpoena of the Court or on demand of a lawful authority, clearly manifested the positive will of the Legislature to restrict the provisions of the Federal Communications Act to persons other than law enforcement officers.

As a rule of construction, the question whether the word "person", as used in Section 605 of the Federal Communications Act, applies to a "State" or "Officer" is to be determined from the "legislative environment" of the Statute (*Sims* v. *United States*, 359 U. S. 108; *United States* v. *United Mine Workers of America*, 330 U. S. 270; *Ohio* v. *Helvering*, 292 U. S. 360, [illegible]; *Georgia* v. *Evans*, 316 U. S. 159).

In *Sims* v. *United States, supra*, this Court declared anew its long-tested formula of statutory construction:

> "*Whether the term 'person', when used in a Federal statute includes a State, cannot be abstractly declared, but depends upon its legislative environment* (cases cited)."

In *United States* v. *United Mine Workers of America*, *supra*, at page 275, this Court stated:

> "*There is an old and well-known rule that statutes which, in general terms, divest pre-existing rights or privileges, will not be applied to the sovereign without express words to that effect* . . ."

Delving further into Sec. 605, we find that Congress provided that no person having received an intercepted communication or having become acquainted with its contents, "shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained *for his own benefit, or for the benefit of another not entitled thereto.*"

It is manifest that these qualifying words in the Act further bolster the construction that the Congress never intended to proscribe a law enforcement officer within its terms.

It would be stretching all logic to the breaking point, to say that the use of an intercepted communication by a District Attorney in the prosecution of crime was one "for his own benefit" as an individual, rather than as a "judicial officer" for the public benefit.

Thus, applying the "legislative environment" standard laid down by this Court to Section 605 of the Federal Communications Act, it is clear beyond cavil that the interception of telephone communications banned by the Act was never intended to apply to State law enforcement officers, acting pursuant to lawful Court orders under the Statute and Constitution of the State of New York.

C. Other indicia of congressional intent.

First and foremost, of course, is the Court's own co
struction of Section 605 in relation to Article I, Section 1
of the New York State Constitution, in *Stemmer* v. *Peop*
of the State of New York, *supra*.

Secondly, is the contention of the Government itself i
Benanti v. *United States*, *supra*, before this Court. There
the Solicitor General urged upon the Court that Congres
had no intention of preventing legal wire-tapping unde
Court order, pursuant to New York Law (Article 1, Sectio
12 of the New York State Constitution; Section 813-a o
the New York Code of Criminal Procedure) (*Brief of th*
United States, pp. 15-18-19).

The Government's unequivocal contention was as follows

> "*A Federal law should not be construed to nullif*
> *by implication a state law regulating its interna*
> *affairs.*
>
> *If the New York City police, acting pursuant to*
> *warrant issued by a state court, could legally inter*
> *cept the telephone communications to and from th*
> *Reno Bar, then the trial court was entirely justifie*
> *in accepting the evidence entirely apart from th*
> *argument set forth in Point I, supra. However, th*
> *court below held that because of the supremacy o*
> *federal law, Section 605 of the Communications Ac*
> *took precedence over the New York law. We urg*
> *that, in view of the reluctance of the Court to inter*
> *pret a federal law as nullifying by implication*
> *state enactment, the Communications Act should b*
> *interpreted to permit both laws to stand.*
>
> *We are dealing here with intergovernmental rela*
> *tions where it is important that each sovereign b*

permitted to act with as little restriction as possible within its field of jurisdiction so long as no undue interference is caused to the jurisdiction of the other. In line with this policy, the courts have repeatedly held that federal laws of apparently general application should not be construed to outlaw state action . . . .

In reviewing the legislative history of the Federal Communications Act, the Government's brief in support of the legality of New York's wire-tap procedure specifically noted that "Congress carefully preserved areas of state regulation throughout the enactment".

It pointed up the statement by Senator Dill, Chairman of the Senate Committee on Interstate Commerce, who introduced the Bill, that: "*Ninety-eight percent of the telephone business of this country is within the states (78th Cong. Rec. 4139)*".

Again, at page 25 of the Government's brief:

> "*It follows that, since Congress has recognized intrastate telephone communication as a matter primarily of state concern, Section 605 should not be interpreted as preventing the people of a state from adopting the measures which they regard as necessary to their program of law enforcement. Our system of dual sovereignty confers responsibility for ordinary law enforcement primarily on the states. Congress, in regulating telephone communications, has recognized the interest of the states in that field. The combination of the various state interests involved in this problem suggests that only the clearest expression of Congressional intent should be permitted to prevent a state from adopting reasonable measures with respect to interception in aid of local law enforcement. Section 605 is not, we submit, that*

clear expression of Congressional intent to preempt the field which would prevent a state from adopting the kind of constitutional amendment and statute which New York has adopted and maintained since 1938".

CONCLUSION

The case at bar should be determined on the basis of the Court's precedent in *Stemmer* v. *People of the State of New York*, 336 U. S. 963, re-hearing denied, 337 U. S. 921, holding that interception of telephone communications pursuant to Article 1, Section 12 of the New York State Constitution, is not in conflict with Section 605 of the Federal Communications Act.

Such a construction of the federal statute would (a) give full effect to the manifest intent of Congress; (b) reconcile the Act to the Court's settled policy of determining all wiretap cases on the basis of principles faithful to the reasonable search-seizure requirements of the Fourth Amendment; and (c) preserve the constitutionality of Section 605 in the context of the reserved police powers under the Tenth Amendment.

December 6, 1960

Respectfully submitted,

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